



Entered on Docket  
December 03, 2008

Hon. Bruce A. Markell  
United States Bankruptcy Judge

FENNEMORE CRAIG, P.C.  
LAUREL E. DAVIS, ESQ.  
Nevada Bar No. 3005  
E-MAIL: ldavis@fclaw.com  
300 S. Fourth Street, #1400  
Las Vegas, NV 89101  
Telephone (702) 692-8000  
Facsimile (702) 692-8099  
Attorney for Timothy S. Cory  
Chapter 11 Trustee of HDB, LLC

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEVADA**

In re:

HDB, LLC,

Debtor.

Case No.: BK-S-08-10685-BAM  
Chapter 11

Date: November 25, 2008  
Time: 3:00 p.m.

**ORDER APPROVING AMENDED AND RESTATED STIPULATION REGARDING (A) USE OF CASH COLLATERAL BY DEBTOR PURSUANT TO 11 U.S.C. § 363(c)(2); (B) GRANTING ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. § 361 AND 363(e); AND (C) AUTHORIZING POST-PETITION FINANCING ON A SENIOR SECURED BASIS PURSUANT TO 11 U.S.C. § 364(d)(1)**

On November 25, 2008, the Motion for Entry of an Order Approving Amended and Restated Stipulation Regarding (A) Use of Cash Collateral By Debtor Pursuant to 11 U.S.C. § 363(c)(2); (B) Granting Adequate Protection Pursuant to 11 U.S.C. § 361 and 363(e); and (C) Authorizing Post Petition Financing on a Senior Secured Basis Pursuant to 11 U.S.C. § 364(d)(1) (the "Motion"); having been filed by Timothy S. Cory, Chapter 11 Trustee ("Trustee") for the estate of HDB, LLC (Debtor) came on for hearing before the above-entitled Court.<sup>1</sup> Laurel E.

<sup>1</sup> Unless otherwise ascribed herein or otherwise noted, all defined terms have the meaning set forth in the Motion and Amended and Restated Stipulation.

1 Davis, Esq. of the law firm of Fennemore Craig, P.C. appearing on behalf of the Trustee, Gerald  
 2 M. Gordon, Esq., and Christine Bricker, Esq., of the law firm Gordon & Silver, LTD. appearing  
 3 on behalf of Nevada State Bank, Secured Creditor and proposed 364 Lender; James Greene, Esq.  
 4 of the law firm Brownstein Hyatt Farber Schreck, LLP, appearing on behalf of TierOne Bank,  
 5 Secured Creditor and proposed 364 Lender; Lance Earl, Esq., of the law firm Holland & Hart  
 6 LLP, appearing on behalf of Colonial Bank, Secured Creditor and proposed 364 Lender; Donna  
 7 M. Osborn, Esq. of the law firm Marquis & Aurbach, appearing on behalf of the Unsecured  
 8 Creditors Committee; and other appearances having been noted in the Court's record. The Court  
 9 read and considered all relevant pleadings and papers including but not limited to the Motion and  
 10 the attached Amended and Restated Stipulation For (A) Use of Cash Collateral By Debtor  
 11 Pursuant to 11 U.S.C. § 363(c)(2); (B) Granting Adequate Protection Pursuant to 11 U.S.C. § 361  
 12 and 363(e); and (C) Authorizing Post Petition Financing on a Senior Secured Basis Pursuant to  
 13 11 U.S.C. § 364(d)(1) ("Amended and Restated Stipulation") and Principal Term Summary  
 14 ("Term Sheet"), including all modifications and clarifications set forth on the record, and after  
 15 due deliberation and consideration, and good and sufficient cause appearing therefor:

16 The Court Hereby Finds and Concludes as Follows:

17 1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and  
 18 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this  
 19 Court pursuant to 28 U.S.C. §§ 1408 and 1409.

20 2. The Trustee has provided notice of the Motion and hearing in compliance with  
 21 Bankruptcy Rule 4001(b), (c) and (d), Bankruptcy Rule 9014 and LR 4001(b).

22 3. Upon the entry of this Order and upon the satisfaction of all Closing conditions as  
 23 provided for in the Motion and Amended and Restated Stipulation, all necessary action will have  
 24 been taken to permit the construction and full use of the Improvements for their intended purpose  
 25 under applicable Legal Requirements.<sup>2</sup>

26  
 27 <sup>2</sup> This term is defined in the proposed Loan and Security Agreement, attached as Exhibit 1.C to  
 28 the Declaration of Timothy S. Cory in Support of Motion For Entry Of An Order Approving  
Amended And Restated Stipulation Regarding (A) Use Of Cash Collateral By Debtor Pursuant  
To 11 U.S.C. § 363(c)(2); (B) Granting Adequate Protection Pursuant To 11 U.S.C. §§ 361 And

1           4. No consent, approval, authorization or order of any Governmental Authority or  
2 other Person is required for the execution, delivery and performance by Trustee on behalf of  
3 Debtor of, or compliance by Debtor with, the 364 Loan Documents or the consummation of the  
4 transactions contemplated thereby, other than those which already have been obtained by Debtor.

5           5. The execution and delivery of the 364 Loan Documents by Trustee on behalf of  
6 Debtor and the performance of his obligations hereunder and thereunder will not conflict with  
7 any Legal Requirement to which the Trustee or Debtor is subject, or conflict with, result in a  
8 breach of, or constitute a default under, any of the terms, conditions or provisions of any  
9 agreement or instrument to which Debtor is a party or by which it is bound, or any order or  
10 decree applicable to Debtor, or result in the creation or imposition of any Lien on any of Debtor's  
11 assets or property (other than pursuant to the 364 Loan Documents).

12           6. The 364 Loan is in the best interests of the Debtor's estate and its creditors, as the  
13 364 Loan will, among other things, provide the Debtor with necessary liquidity to sustain  
14 operation of the Debtor's Business and enhance the Debtor's prospects for a successful  
15 reorganization through the completion and sale of the Project. It is in the best interests of the  
16 Debtor's estate to complete construction of the Project and Property Improvements and to sell  
17 the 113 Units to maximize value to the estate and creditors. In order to accomplish this  
18 objective, the Trustee must maintain and preserve the Property through borrowing sufficient  
19 funds to secure the Property, complete construction of the Project and Property Improvements,  
20 market and sell the Units and satisfy allowed secured claims evidenced by valid and perfected  
21 liens against the Project.

22           7. The Debtor: (a) is indebted to the Bank Group for all of the amounts due under  
23 the Bank Group Loans, which Bank Group Loans are not subject to any defense, counterclaim or  
24 offset of any kind, as of the Petition Date; and (b) is liable to the Bank Group under the Bank

25 \_\_\_\_\_ (continued)

26 363(e); And (C) Authorizing Post-Petition Financing On A Senior Secured Basis Pursuant to 11  
27 U.S.C. § 364(d)(1) and the Amended And Restated Motion For Entry Of An Order Establishing  
28 Procedures For And Authorizing: (1) Unit Sales, Free And Clear Of Liens, Claims And Interests  
Pursuant To 11 U.S.C. § 363; And (2) Resolution And Payment Of Claims filed on October 28,  
2008, as Doc. #495.

1 Group Loan Documents as set forth below (inclusive of interest and fees accrued and unpaid  
2 thereon and other costs, expenses and indemnities). The Bank Group Liens as evidenced by the  
3 Bank Group Loan Documents are valid, perfected, unavoidable and enforceable against the  
4 Collateral in which the Bank Group Liens are granted pursuant to the Bank Group Loans.  
5 *Notwithstanding* the foregoing binding admissions, agreements and acknowledgements on the  
6 part of the Trustee and Debtor: (a) other parties in interest on their own behalf may seek to avoid  
7 or challenge the validity, perfection or enforceability of the Bank Group Liens; and (b) the Bank  
8 Group specifically reserves all of their legal, equitable and other applicable rights to defend the  
9 validity, perfection, extent of, enforceability and priority of the Bank Group Loans and the Bank  
10 Group Liens and to challenge the standing of any such parties in interest to seek to avoid or  
11 challenge the validity, perfection, extent of or enforceability of the Bank Group Loans and the  
12 Bank Group Liens, whether on such parties in interest own behalf or on behalf of the Debtor.

13 9. Prior to the Petition Date, Debtor was in default under some or all of the Bank  
14 Group Loan Documents and as a result of the filing of the Case, Debtor is in default under all of  
15 the Bank Group Loan Documents.

16 10. As of the Petition Date the unpaid balances due under the various Bank Group  
17 Loans were as follows:

18 (a) The NSB Loan was \$23,962,625.01 plus accrued interest of \$1,469,587.51  
19 at the Note Rate and \$1,904,094.23 at the Default Rate, for a total of \$27,336,306.75,  
20 plus late fees, other charges and expenses, reasonable attorneys' fees and costs and  
21 expenses of collection.

22 (b) The First TierOne Loan was \$11,122,216.65 plus accrued interest of  
23 \$88,587.16 at the Note Rate and \$375,825.07 at the Default Rate, for a total of  
24 \$11,586,628.88, plus late fees, other charges and expenses, reasonable attorneys' fees and  
25 costs and expenses of collections.

26 (c) The Second TierOne Loan was \$8,062,000.00 plus accrued interest of  
27 \$64,216.07 at the Note Rate and \$272,428.42 at the Default Rate, for a total of  
28 \$8,735,288.98, plus late fees, other charges and expenses, reasonable attorneys' fees and

1 costs and expenses of collection.

2 (d) The First Colonial Loan was \$11,150,000.00 plus accrued interest of  
3 \$152,769.58 at the Note Rate, for a total of \$11,302,769.58, plus late fees, other charges  
4 and expenses, reasonable attorneys' fees and costs and expenses of collection.

5 (e) The Second Colonial Loan was \$10,035,859.73 plus accrued interest of  
6 \$127,192.74 at the Note Rate, for a total of \$10,163,052.47, plus late fees, other charges  
7 and expenses, reasonable attorneys' fees and costs and expenses of collection.

8 10. Given the Debtor's current financial condition, the Debtor cannot obtain  
9 unsecured credit allowable under § 503(b)(1) of the Bankruptcy Code as an administrative  
10 expense, and the 364 Loan is not otherwise available without the Debtor securing, pursuant to §  
11 364(d)(1) of the Bankruptcy Code, such indebtedness and obligations with senior security  
12 interests in and liens on the Project. The Debtor has no property that could be used to provide  
13 adequate protection to the Bank Group to protect the Bank Group Liens as required by Section  
14 364(d) without the Bank Group's consent, which the Bank Group is not willing to provide except  
15 pursuant to the terms of the Amended and Restated Stipulation. The 364 Lenders in agreeing to  
16 extend credit and provide financing to Debtor as provided for in the Motion, Amended and  
17 Restated Stipulation and the Loan Document have individually and collectively acted in good  
18 faith.

19 Having placed its additional findings and conclusions of law on the record in accordance  
20 with Federal Rule of Bankruptcy Procedure 7052 incorporating Federal Rule of Civil Procedures  
21 52(a), and good and sufficient cause appearing therefor,

22 IT IS HEREBY ORDERED that:

23 1. The Motion, including and incorporating the Amended and Restated Stipulation,  
24 and Term Sheet, is approved, and the Amended and Restated Stipulation shall be binding upon  
25 the parties as provided for therein.

26 2. Upon and after the Closing the Trustee on behalf of the Debtor shall be entitled to  
27 use all Cash Collateral contained in the Pre-Petition Bank Accounts and post petition proceeds  
28 from the sale of Units in the Project and/or the Project itself pursuant to the terms of and based

1 upon the conditions set forth in the Amended and Restated Stipulation.

2 3. The Trustee on behalf of the Debtor is expressly authorized to borrow from the  
3 Lenders and Credit Agent, the 364 Loan in accordance with the Amended and Restated  
4 Stipulation and Term Sheet, and use such proceeds in the operation of the Debtor's business and  
5 complete construction of the Project and market the 113 Units, on terms and subject to the  
6 conditions set forth in the Motion, Amended and Restated Stipulation and Term Sheet up to a  
7 total of \$37,888,639.

8 4. The Trustee on behalf of the Debtor is expressly authorized and directed to  
9 execute and deliver the 364 Loan Documents, including the Loan Agreement, Promissory Note,  
10 Deed of Trust, Security Agreement and Assignment of Leases, and Fixture Filing, the terms of  
11 which 364 Loan Documents shall adopt the Budget and evidence the terms and conditions of the  
12 364 Loan, in form and content mutually acceptable to the Trustee and 364 Lenders in their sole  
13 discretion.

14 5. The Trustee on behalf of the Debtor is authorized and directed to prepare, sign  
15 and file all documents necessary to accomplish the Annexation required by Paragraph 15.11 of  
16 the Amended and Restated Stipulation.

17 6. Upon the Closing, each Loan Document shall be the legal, valid and binding  
18 obligation of Debtor, enforceable against Trustee and Debtor in accordance with its terms.

19 7. As security for the obligation, the Lenders and Credit Agent shall have and are  
20 hereby granted without the necessity of compliance with any federal, state or local requirements  
21 or law requiring execution, filing, notice or recordation of deeds of trust, security agreements,  
22 pledge agreements, financing statements, trademark, copyright, trade name or patent assignment  
23 filings with the United States Patent and Trademark Office or United States Copyright Office,  
24 landlord lien waivers, licensee or licensor consents or otherwise ("Perfection Act"), pursuant to  
25 11 U.S.C. § 361 and 364(d)(1) a valid, perfected and enforceable first priority, senior secured  
26 lien and security interest ("Senior Lien") upon all of Debtor's right, title and interest in, to and  
27 under all of the Units and Buildings and undivided interests in all of the Common Elements  
28 appurtenant to the Project, including the Sale Contracts, senior to all liens and security interests

1 previously granted in the Project, including mechanics liens which arise under the operation of  
2 applicable state law.

3 8. No additional liens or claims superior to or *pari passu* with the 364 Lien shall be  
4 granted while any portion of the 364 Loan or Bank Group Loans remains outstanding, absent the  
5 364 Lenders' prior written consent in their sole and absolute discretion.

6 9. Upon and after the Closing, the Trustee and Debtor will warrant and defend the  
7 validity and priority of the Liens of the Security Documents on the Property against the claims of  
8 all Persons, subject only to Permitted Encumbrances.

9 10. The Trustee shall: (a) provide notice to the Bank Group as soon as practicable of  
10 the occurrence of any Event of Default (hereinafter defined) or any event known to the Trustee  
11 or his counsel which, with the passage of time or giving of notice, or both, would constitute an  
12 Event of Default; (b) oppose any appeal or other challenge to the Amended and Restated  
13 Stipulation or this Order, including any action taken to amend, modify, or vacate the Amended  
14 and Restated Stipulation or this Order without the Bank Group's written consent; (c) only incur  
15 indebtedness reasonably necessary for the operation of the Business and to preserve and protect  
16 the estate and estate assets, all in accordance with the Budget; and (d) not commence any action  
17 against the Bank Group (including the commencement of an avoidance action as provided for in  
18 Sections 510, 542, 543, 544, 545, 547, 548, 549, 550 and 553(b)) of the Bankruptcy Code which  
19 would impair or impact upon the rights of the Bank Group regarding the 364 Loan and the Bank  
20 Group Obligations without the prior written consent of the Bank Group in their sole and absolute  
21 discretion.

22 11. As provided in the Amended and Restated Stipulation, the Trustee's authority to:  
23 (a) obtain the 364 Loan; (b) use the 364 Loan Funds; and (c) use Cash Collateral shall terminate  
24 immediately upon the occurrence and continuation of any of the following events (the "Events of  
25 Default"):

26 (a). The Trustee violates any of the material provisions of the 364 Loan  
27 Documents, Sale Order, this Order or the Amended and Restated Stipulation except for  
28 those defaults waived in writing by the Bank Group;



(b). The Case is converted to a case under Chapter 7 of the Bankruptcy Code;

(c). Any lien, security interest or priority created by the Amended and Restated Stipulation or this Order shall, for any reason, cease to be valid and enforceable in accordance with the original terms of the Amended and Restated Stipulation; or an order is entered by this Court amending, modifying, supplementing, vacating, or staying the Sale Order, this Order or the Amended and Restated Stipulation without the written consent of the Bank Group;

(d). This Court enters an order:

(i). Granting relief from the automatic stay applicable under Section 362 of the Bankruptcy Code to the holder of any security interest or lien upon the Project; or

(ii). Granting any lien or security interest that is senior or pari passu to the Bank Group Liens or the 364 Lien;

(iii). The Trustee or Debtor files any motion or plan of organization or takes any action inconsistent with the Sale Order, this Order or the Amended and Restated Stipulation;

(iv). A plan of reorganization which is opposed by the Bank Group is confirmed by this Court; or

(v). The Trustee defaults in the performance of any of its obligations (or the Court fails to enter an order) as set forth in the Sale Order, this Order or the Amended and Restated Stipulation.

12. Upon the occurrence and continuation of any of the events set forth above past a cure period of five business days ("Cure Period") as set forth in a written notice to the Trustee, such occurrence shall be deemed to be an event of default ("Event of Default") and the Trustee's authority to use Cash Collateral or to have access to the 364 Loan Funds shall immediately and automatically terminate, and, upon the expiration of the Cure Period, the Bank Group shall be entitled to submit an ex parte Order to this Court providing for relief from the automatic stay of Section 362(a) of the Bankruptcy Code to pursue the remedies as provided for in the Bank Group



1 Loan Documents, 364 Loan Documents and applicable state law. Provided however, that any  
2 Event of Default may be waived in writing by the Bank Group. Upon the receipt by the Trustee  
3 of any such written waiver, the Trustee's authority to use Cash Collateral or to incur  
4 indebtedness under the 364 Loan pursuant to the terms and conditions of this Order or the  
5 Amended and Restated Stipulation shall be retroactively reinstated as if no Event of Default had  
6 occurred. The Bank Group consents to the Trustee seeking a hearing before the Court on order  
7 shortening time during the Cure Period if the Trustee contests the right of the Bank Group to  
8 declare an Event of Default and terminate the use of Cash Collateral and advances under the 364  
9 Loan.

10 13. The Court having found that the Lenders both individually and collectively in  
11 agreeing to extend credit and provide financing to Debtor have acted in good faith, the Lenders  
12 and Credit Agent are entitled to the full protections under § 364(e) of the Bankruptcy Code with  
13 respect to the 364 Loan and the Senior Lien as created or authorized by this Order. In the event  
14 that this Order or any authorization contained herein is stayed, vacated, reversed or modified on  
15 appeal, any such stay, modification, reversal or vacation of this Order shall not affect the validity  
16 of any obligation of the Trustee and Debtor to the Lenders and Credit Agent incurred pursuant to  
17 this Order. Notwithstanding any such stay, modification, reversal or vacation, all financing  
18 provided pursuant to the 364 Loan Documents, Amended and Restated Stipulation or this Order,  
19 and any obligations incurred by the Debtor pursuant to the 364 Loan Documents, Amended and  
20 Restated Stipulation or this Order prior to written notice of the effective date of any such stay,  
21 modification, reversal or vacation, shall be governed in all respects by the original provision  
22 hereof and the Lenders and Credit Agent shall be entitled to all the rights, privileges, and  
23 benefits, including without limitation, the security interests and priorities granted pursuant to this  
24 364 Loan Documents, Amended and Restated Stipulation and this Order.

25 14. Neither the lien granted to the Bank Group under this Order pursuant to Section  
26 364(d) of the Bankruptcy Code nor any other provision of this Order is intended or shall be  
27 deemed to negate, alter, amend or supersede in any manner the terms, conditions and restrictions  
28 related to the construction and development of the Project that are contained in the Declaration

1 of Development Covenants and Restrictions dated as of December 14, 2001 and recorded on  
2 December 18, 2001 with the Office of the County Recorder of Clark County, Nevada in Book  
3 20011218 as Instrument No. 00146 and any and all amendments thereto, all of which shall  
4 remain in full force and effect.

5 15. Nothing in this Order shall negate, alter, amend or supersede the obligations of  
6 the Debtor under the Agreement for the Purchase and Sale of Real Property between Howard  
7 Hughes Properties, Inc. and Westmark Homes (as assignor to the Debtor) dated as of December  
8 14, 2001, and any and all amendments thereto without a further Order of this Court.

9 16. Upon entry of an this Order, Aspen shall be entitled to receive immediate  
10 disbursement of the loan proceeds in the approximate amount of \$1,500,000 remaining on  
11 deposit with Nevada Construction Services for the benefit of the Debtor and Aspen  
12 ("Construction Control Funds"). Nevada Construction Services is therefore hereby authorized  
13 and directed to release the Construction Control Funds to Aspen upon entry of this Order.

14 17. Notwithstanding anything to the contrary in the Bankruptcy Code or the  
15 Bankruptcy Rules, this Order shall be entered as, and shall be, effective immediately upon its  
16 entry on the Docket in this Case as a final Order of the Court for all purposes.

17 DATED: November 25, 2008.

18 PREPARED AND SUBMITTED:

19 FENNEMORE CRAIG, P.C.

20 By: /s/ Laurel E. Davis  
21 LAUREL E. DAVIS, ESQ.  
22 300 S. Fourth St., Ste. #1400  
23 Las Vegas, NV 89101  
Attorneys For Timothy S. Cory,  
Chapter 11 Trustee

1 APPROVED:

2 BROWNSTEIN HYATT FARBER  
3 SCHRECK

4 By /s/ James D. Greene  
5 JAMES D. GREENE, ESQ.  
6 100 City Parkway, Suite 1600  
7 Las Vegas, NV 89106  
8 Attorneys For TierOne Bank

9 APPROVED:

10 HOLLAND & HART, LLP

11 By /s/ Lance Earl  
12 LANCE EARL, ESQ.  
13 3930 Howard Hughes Pkwy, 4th Floor  
14 Las Vegas, NV 89169  
15 Attorneys for Colonial Bank

APPROVED:

MARQUIS & AURBACH

By /s/ Donna M. Osborn  
DONNA M. OSBORN, ESQ.  
10001 Park Run Drive  
Las Vegas, NV 89145  
Attorneys for Unsecured Creditors Committee

APPROVED:

GORDON SILVER

By /s/ Gerald M. Gordon  
GERALD M. GORDON, ESQ.  
3960 Howard Hughes Pkwy, 9<sup>th</sup> Floor  
Las Vegas, NV 89169  
Attorneys for Nevada State Bank

###

**LR 9021 CERTIFICATION**

In accordance with LR 9021, counsel submitting this document certifies as follows:

☐ The Court waived the requirement of approval under LR 9021.

☒ Except as noted below, counsel waived the requirement of approval under LR 9021 on the record at the time of the hearing.

☐ No parties appeared or filed written objections, and there is no trustee appointed in this case.

☒ A copy of this proposed order was delivered to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below: (list each party and whether the party has approved or failed to respond to the document).

Gerald Gordon, Gordon & Silver, counsel for Nevada State Bank, approved

James Greene, Brownstein Hyatt Farber Schreck, counsel for TierOne Bank, approved

Lance Earl, Holland & Hart, LLP, counsel for Colonial Bank, approved

Dean Waldt, Ballard Spahr Andrews & Ingersol, counsel for Howard Hughes Properties, Inc., requested additional language, which has been added

Donna Osborn, Marquis & Aurbach, counsel for the Unsecured Creditor Committee, approved

Robert Kinas, Snell & Wilmer, counsel for Bergelectric, approved

Nile Leatham, Kolesar & Leatham, counsel for Aspen Financial, approved

Victoria Nelson, Santorro, Driggs, Walch, Kearney, Holley & Thompson, counsel for Bank of Nevada, approved